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Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation

Geoffrey C. Rapp¹

Traditional law and economics allows no place for price controls. Yet public support for anti-gouging legislation has led to the enactment of a variety of legal regimes to control price hikes following natural and man-made disasters such as hurricanes and terrorist attacks. This Article provides an economic justification for such laws. First, the Article surveys the existing models of anti-gouging legislation. Then, it describes the traditional economic critique of price caps, a critique applied to anti-gouging laws. Finally, the Article argues that anti-gouging laws enhance economic efficiency by ensuring a functioning consumer market after the collapse of electronic payment systems on which the American economy now depends. The externalities of consumption in post-disaster environments mean that the costs of consumers forgoing needed products are not adequately captured by a reliance on market mechanisms. In addition, anti-gouging laws may offset market inefficiencies caused by the decision making heuristics of suppliers. This analysis suggests that current anti-gouging laws should be restructured to include a more discrete focus on areas actually affected by physical damage from natural or man-made disasters.

LAW and economics loathes price controls. From rent controls for residential apartments in New York City² to caps on wholesale oil prices in Hawaii,³ price controls have received harsh criticism from economics-minded commentators.⁴ Certainly, price controls have objectionable con-

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² See, e.g., Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988).

³ Jim Lindgren, *Wholesale Gas Caps: An Economic Experiment in Hawaii*, THE VOLOKH CONSPIRACY, Aug. 28, 2005, http://volokh.com/archives/archive_2005_08_28-2005_09_03.shtml.

⁴ See, e.g., John R. Lott Jr. & Sonya D. Jones, *Politicians in Need of Economics 101: Raising Prices at Gas Pumps Before a Fuel Shortage Means We'll Pay Less Overall, a Notion Lost on Officials*

sequences. For example, they lead to shortages, rationing, and inefficiency. Under price controls, fewer goods and services are available, and they are allocated to those lucky enough to be first in line rather than those who need them most.⁵ To law and economics scholars, "gouging" is just a harsh way of saying "market equilibrium." Producers who raise prices to the level consumers are willing to pay are simply performing as Adam Smith's invisible hand would direct.⁶

Yet the public resents gouging⁷ as much as law and economics scholars loathe price controls.⁸ When gas prices soared in the wake of Hurricane Katrina's tragic landfall near New Orleans, President Bush made an appearance on "Good Morning America" and equated gasoline price-gougers with looters.⁹ Gas prices did soar across the country, reaching \$6.00 per gallon in some locations.¹⁰ Public outrage soared as well.¹¹ For members of Congress,

Outraged by 'Price Gouging,' NEWSDAY, Sept. 6, 2005, at A33.

5 See *infra* Section II.

6 See Walter E. Williams, *The Role of Prices*, THE WASH. TIMES, Sept. 16, 2005, available at <http://washingtontimes.com/commentary/20050915-090251-9667r.htm>.

7 It is by no means clear, however, that there is a generally agreed upon definition of "gouging," even among its critics. Gouging obviously involves some element of a high, or increased price, and some element of coercion, immorality, or opportunism on the part of a product's or service's seller.

8 Allegations of gouging after natural disasters are widely reported in the media, even well beyond the affected areas. See Gary E. Lehman, *Price Gouging: Application of Florida's Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew*, 17 NOVA L. REV. 1029, 1032 (1993). Consumer outrage is particularly strong with respect to gouging relating to certain core commodities like gasoline. See Cary A. Deck & Bart J. Wilson, *Economics at the Pump: Does "Anti-Price Gouging" Legislation Really Help Gasoline Consumers?*, REG., Spring 2004, at 22 ("The intensity of this backlash from spikes in gasoline prices is remarkable given that many commonly consumed products can change in price radically in a short period of time."). For articles describing previous episodes of post-hurricane price gouging, see Timothy L. Collins, *"Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide*, 59 ALB. L. REV. 1293, 1315 n.130 (2003).

9 See Holly Manges Jones, *President Bush: "Zero Tolerance" for Katrina Lawbreakers*, JURIST, Sept. 1, 2005, available at <http://jurist.law.pitt.edu/paperchase/2005/09/president-bush-zero-tolerance-for.php>. The President warned: "I think there ought to be zero tolerance of people breaking the law during an emergency such as this, whether it be looting, or price-gouging at the gasoline pump" *Id.* The President did not explain how price-gouging would violate the law. His analogy is also not original. In the aftermath of Florida's 1992 experience with Hurricane Andrew, state Attorney General Bob Butterworth opined, "I don't see any difference between the looters, who go through the rubble in the trailer parks, and the business people who cash in on this disaster by gouging customers. I can't give you a good definition of the difference between a looter and a price gouger, except that the price gouger may wear a suit and tie." See Lehman, *supra* note 8, at 1033.

10 B.J. Reyes, *Gas Prices Rise Slowly on Initial Day of Cap: Supporters Say the Law Shielded Hawaii From the Effects of Katrina*, HONOLULU STAR-BULLETIN NEWS, Sept. 2, 2005, available at <http://starbulletin.com/2005/09/02/news/story3.html>.

11 See Lott & Jones, *supra* note 4, at A33 ("With oil prices reaching \$70 per barrel and hotels outside of the Katrina disaster area raising rates, 'price gouging' seems to be politicians'")

skyrocketing gas prices provided an irresistible target for election-year indignation. In a *Washington Post* poll, seventy-two percent of respondents felt that oil companies were gouging, and eight in ten faulted the federal government's response to the oil companies' tactics.¹² According to the Associated Press, 5,000 angry consumers contacted the Energy Department's hotline to complain of gas price gouging.¹³ Gouging allegations also surfaced in the wake of major terrorist strikes. When gas station owners in Michigan raised prices in the hours after the September 11 attacks on New York and Washington (in some cases to nearly double their pre-attack levels),¹⁴ then-Attorney General Jennifer Granholm immediately listed fifty offending stations, demanded apologies and refunds for customers, and ordered the payment of fines for violations of the state's Consumer Protection law.¹⁵ Nearly all listed stations complied.¹⁶

Public angst with gouging (however defined) has led to legal actions to prevent post-crisis price gouging.¹⁷ Federal antitrust laws are the first line of defense. The Sherman Act bars collaborative price gouging by forbidding horizontal "price fixing;" the Robinson-Patman Act bars price discrimination that might tend to reduce competition. Most scholars would acknowledge that such laws actually promote economic efficiency (even in post-disaster environments) by minimizing the deadweight loss of monopolistic conduct.¹⁸ But a more recent phenomenon is the widespread adop-

favorite phrase these days."); see also John Stossel, *In Praise of Price Gouging*, TOWNHALL.COM, Sept. 7, 2005, <http://townhall.com/opinion/columns/JohnStossel/2005/09/07/155361.html> ("Politicians and the media are furious about price increases in the wake of Hurricane Katrina.").

12 Richard Morin & Claudia Deane, *Poll Sharply Divided Over Bush*, PITT. POST-GAZETTE, Sept. 4, 2005, at A13.

13 Associated Press, *Thousands Complain to Feds on Gas Gouging: Lawmakers Demand an Investigation*, MSNBC, Sept. 2, 2005, <http://msnbc.msn.com/id/9170150/>.

14 See Dawson Bell, *Petroleum Panic: Gas Station Owner to Defend Prices in Court*, DETROIT FREE PRESS, March 11, 2002, at 1A.

15 See *id.*

16 *Id.* Michigan's law bars "grossly excessive" prices but does not specify what that term means. As a result, formal price gouging charges are rare and rarely proceed beyond allegation and settlement. One station owner, Bobbie Jean Harvey, refused to admit wrongdoing and forced the state to take her to court. *Id.* Although I was unable to determine the outcome of her case, she has become a bit of a *cause celebre* for Libertarians. See Rob Moody, *A September 11 Profiteer*, MISES INST., July 24, 2002, <http://www.mises.org/fullstory.aspx?control=1009&id=74>.

17 An advocacy group called "Citizens Against Gasoline Price Gouging" helped bring about a wholesale gasoline price cap in Hawaii. See Reyes, *supra* note 10. That new law requires the Public Utilities Commission for the state to set a maximum wholesale price each week based on weekday average of spot prices in certain mainland markets. *Id.*

18 See, e.g., Raymond A. Atkins, *An Economic Model of Tying: Obtaining a First Mover Advantage*, 5 GEO. MASON L. REV. 525 (1997).

tion of state consumer protection laws designed to prevent price gouging after natural or man-made disasters.

Such statutes take several forms. Some impose explicit percentage limitations on post-disaster price hikes.¹⁹ Others bar "unconscionable" price hikes, with varying definitions of unconscionability tied to pre-market prices, post-disaster costs, or the prices of comparable products.²⁰ Some bar any increase whatsoever above pre-disaster levels.²¹

Mainstream law and economics scholars would undoubtedly object to such regulations for the same reasons they find price controls generally unwarranted.²² In response, supporters of disaster-relief anti-gouging statutes could point to moral or distributional concerns.²³ Disasters may allow sellers to raise prices and extract a higher level of "surplus" from consumers. Fairness proponents might object to the redistribution of surplus from buyers to sellers that follows disasters. The problem with the fairness defense of anti-gouging laws is that it is too hard to reconcile a fairness defense with an economic critique. Because the two views express themselves in terms of two completely different goals, using two completely different vocabularies, the supporters and opponents of anti-gouging laws have no way of reaching a shared understanding of the worth of such laws.

This Article presents an alternative way of thinking about the economics of anti-gouging laws. Natural disasters—such as Hurricanes Andrew and Katrina—and massive terrorist assaults—like the 9/11 attacks on New York City—have the potential to cause mass market failures in this era of electronic consumerism. Price gouging may be fine so long as consumers can access their financial assets or credit markets to pay according to their reservation price. But where payment mechanisms have broken down and uncertainty prevents the development of alternative measures, anti-gouging laws may actually be necessary to facilitate a minimum level of com-

19 See *infra* Section I.C.1.

20 See *infra* Section I.C.2.

21 See *infra* Section I.C.3.

22 In addition to the economic objections to post-disaster anti-gouging laws, such laws may raise both constitutional concerns and pose implementation problems. First, any law premised on identification of "emergency conditions" presents the challenge to decisionmakers of distinguishing between emergency and normalcy. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1069–72 (2003); John J. Copelan & Steven A. Lamb, *Disaster Law and Hurricane Andrew—Government Lawyers Leading the Way to Recovery*, 27 URB. LAW. 29, 35–36 (1995) ("The prerequisites for the declaration of both an emergency and a major disaster are very similar. In either case, the governor of the affected state must make a determination that the situation is of such severity and magnitude that the state is unable to respond effectively without federal assistance.").

23 See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1510–13 (1998) (expressing doubt about the efficiency case for anti-gouging laws and suggesting such laws serve distributional or fairness goals).

merce. Because post-disaster commercial transactions often help reduce the negative externalities that natural disasters and terrorist attacks might produce, the result of facilitating a minimal level of commerce may actually be more optimal than what a free market would yield.

This analysis reveals, however, the efficiency limits of anti-gouging laws. Only where the payment systems supporting consumer markets have collapsed is the enforcement of such laws appropriate. Non-coordinated price hikes in areas unaffected by the actual physical impact or secondary consequences of disasters should be permitted without government interference. Because existing state anti-gouging laws do not distinguish adequately between affected and unaffected areas, legislative reform is required.

Moreover, anti-gouging laws may make sense where markets price inefficiently. To the extent that a product is affected by an “availability” or “anchoring” heuristic, the result of a supply—or demand—shock may be an increase in price *beyond* the market optimum. Price increases may become “sticky.” If such heuristics are widespread, it may take too much time for a market to correct naturally. Anti-gouging laws, by preventing rapid price hikes, help avoid this problem of asymmetric market correction.

Section I describes the available legal remedies to prevent post-disaster gouging. Section II describes the traditional law and economics objections to such regulations. Section III outlines this Article’s economic defense of post-disaster price regulation.

I. ANTI-GOUGING LEGAL REGIMES

A. *Antitrust*

Antitrust laws are the first line of defense against gouging in post-disaster environments. Suppliers are frequently accused of “‘price gouging,’ exercising market power, or engaging in collusion.”²⁴

To the extent that such accusations hold water, antitrust law applies. Horizontal price fixing—that is, agreement by competitors to raise prices—is a *per se* violation of the Sherman Act.²⁵ Violations may lead to fines up to \$100,000,000 if the perpetrator is a corporation, \$1,000,000 if the perpetrator is an individual, or a criminal sentence of up to ten years.²⁶ To find a violation, a court must find an agreement respecting price that restrains

²⁴ Deck & Wilson, *supra* note 8, at 23.

²⁵ See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 146–92 (3d ed. 2005).

²⁶ 15 U.S.C. § 1 (2000).

trade.²⁷ In addition to the Sherman Act, the Robinson-Patman Act bars discrimination "in price between different purchasers of commodities of like grade and quality ... where the effect ... may be substantially to lessen competition or tend to create a monopoly ..."²⁸ Potentially, price gouging could violate this act if one set of consumers (say, those in a disaster zone) were charged a different price than another (say, those outside of the disaster zone) *and the effect of that discrimination was to lessen competition*.

Despite its power to prevent cooperative price increases following natural or man-made disasters, antitrust law likely plays a limited role in these settings. Concerted activity rarely seems to be the source of post-disaster price spikes in "hot button" commodities like gasoline.²⁹ Because price shocks more often result from supply interruptions,³⁰ horizontal price fixing and collusion cases are difficult to prove. Moreover, the Robinson-Patman Act has fallen out of favor; the Department of Justice has not enforced the Act since 1977 and the FTC "largely ignores it as well."³¹ In a post-disaster context, proving that price discrimination would *lessen* competition rather than increase it would be exceptionally difficult.³² In addition, in times of crisis, antitrust laws are often stretched or relaxed,³³ making them a less powerful weapon in fighting "gouging" than it first appears.

The weakness of antitrust as a remedy for post-disaster gouging was demonstrated in the aftermath of Hurricane Katrina. On May 22, 2006, the

27 *See id.*

28 15 U.S.C. § 13(a) (2000).

29 *See* Deck & Wilson, *supra* note 8, at 23 (noting that the spring 2000 price spike in the Midwest has been attributed to supply interruptions rather than collusion); *see also* Lott & Jones, *supra* note 4, at A33 ("The American oil industry was no more concentrated when prices started rising immediately before Hurricane Katrina hit than it was two weeks earlier, and oil companies possess no sudden increase in monopoly power.").

30 *See* Deck & Wilson, *supra* note 8, at 23.

31 HOVENKAMP, *supra* note 26, at 579.

32 For the "morass" of problems facing a Robinson-Patman claim, *see id.* at 582-89.

33 *See* Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 ANTITRUST 71 (2002). Several major antitrust cases were suspended during World War I to avoid destabilizing the economy further; those cases, however, did not deal with price gouging resulting from wartime insecurity. *Id.* at 72. Steuer and Barile explain:

Whether to bend, or even to suspend, the antitrust laws in a time of crisis is no easy question, but America's experiences in the First and Second World Wars ... provide instructive precedents. Both World Wars were preceded by periods of vigorous antitrust enforcement. Both times antitrust policy accommodated wartime priorities as necessary, while enforcement was maintained to combat conduct that threatened the economy. The lessons that emerge are that, first, antitrust will not stand in the way of a war effort if it is applied with suitable flexibility; second, if it becomes necessary to suspend antitrust enforcement to some degree, such enforcement can be successfully reinstated at war's end; and, third, war should not and need not excuse opportunism.

Id. at 71.

Federal Trade Commission released a report, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*, in response to two legislative mandates.³⁴ That report concluded that petroleum “companies have not restricted the level of capacity below competitive levels and that they have used their capacity to the fullest practical extent.”³⁵ Anticompetitive conduct was not to blame for post-Katrina price hikes, and therefore antitrust law does not offer a solution.

B. Contract Law

Contract law also plays a potential role. The duty of good faith and fair dealing restrains one party from using economic duress to force modification of a previous contract.³⁶ Similarly, the common-law doctrine of “unconscionability” prevents a court from enforcing the terms of a contract if such terms are particularly objectionable.

These doctrines could play a role in a post-disaster environment, but that role is likely to be limited.³⁷ To begin with, consumers of products have little to gain from individual litigation against sellers. Each “unconscionable” or “bad faith” contract was probably paid for at the time of the transaction, and consumers would have to endure a lengthy litigation process to recover their individual relief, which would amount to only a few dollars even if a court were to “unwind” the contract. Class actions are unlikely to overcome these incentive problems because the differences between/among consumers likely exceed their similarities.

C. Anti-Gouging Laws

Concerned that unilateral action to raise prices following disasters and emergencies would be unassailable under antitrust statutes or the common law, a number of states enacted anti-gouging legislation. More than half of the states now have some form of anti-gouging law.³⁸ At least nineteen of those are laws that prohibit price gouging in the aftermath of disasters.³⁹

34 See Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*, Spring 2006, available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>.

35 *Id.* at 4.

36 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 4.25 (3d ed. 2004).

37 Consumers with an existing contractual arrangement whose contract partners seek renegotiation would likely be able to stop such efforts under the common law doctrine of duress. Such relationships are unlikely to be the major issue in post-disaster environments.

38 Mike Sunnucks, *AG: State Has No Tools to Slow Skyrocketing Gas Prices*, *THE BUSINESS JOURNAL OF PHOENIX*, Sept. 2, 2005, available at <http://www.bizjournals.com/phoenix/stories/2005/08/29/daily61.html>.

39 David Nitkin, *Sticker-Shocked Maryland Drivers Voice Suspicions of Price Gouging*, *BALT. SUN*, Sept. 1, 2005, at 12A.

The remaining laws are general consumer protection provisions rather than laws that apply specifically to post-disaster economic disruptions. A number of states rarely affected by natural disasters, however, have no anti-gouging laws.⁴⁰ Some states have sought to use executive orders to stop gouging where they lack other legislative authorization.⁴¹

Many anti-gouging laws were enacted after particular disasters: Virginia passed its "Post-Disaster Anti-Price Gouging"⁴² law in 2004 following severe damage in 2003 resulting from Hurricane Isabel;⁴³ Florida passed its anti-gouging law⁴⁴ in 1992 in the aftermath of the destruction caused by Hurricane Andrew;⁴⁵ Arkansas' "unusually popular" Act 376⁴⁶ passed by a vote of 88 to 1 in 1997⁴⁷ after a series of devastating tornadoes struck the state;⁴⁸ California's law⁴⁹ was enacted in the wake of reported price gouging

40 *See id.* ("Like many states not often hit by natural disaster, Maryland has no emergency price-protection law. Earlier this year, Attorney General J. Joseph Curran Jr. proposed a bill to limit price increases on 'essential goods and services' during emergencies declared by the governor or president, but a General Assembly committee unanimously rejected it after lobbying by gas distributors and retailers."); *see also* Sunnucks, *supra* note 38 ("Arizona has no price gouging law....").

41 Prior to the passage of its anti-gouging law, Florida used an executive order to try to contain post-disaster price increases. In the wake of Hurricane Andrew on August 23, 1992, Florida Governor Lawton Chiles "issued Executive Order 92-222-E making the imposition or demand of an exorbitant or excessive price by any vendor of fuels, foods, medicines or other necessities a violation of Florida's Deceptive and Unfair Trade Practices Act." Lehman, *supra* note 8, at 1030. Similarly, County Commissioners in affected counties (Dade and Broward) passed emergency ordinances making price gouging an unlawful and unfair business practice (ordinances set to expire one to two months after Hurricane Andrew). *Id.* The executive order did not define the meaning of "exorbitant or excessive price," although county ordinances defined it as "any cost greater than the price for similar goods, services or materials that was imposed or demanded prior to August 24, 1992." *Id.* at 1031.

Florida's Executive Order therefore permitted the state to sue for injunctive relief, actual damages on behalf of affected consumers, and fines of up to \$10,000 for each violation. Private damages actions would also be available. *Id.*

In the wake of Hurricane Andrew, 1,500 consumer complaints were filed with the state. *Id.* at 1037. The state issued fewer than seventy-five subpoenas; "[a]bout one third of the cases in which subpoenas had been issued have been settled with no further action taken." *Id.* Therefore, very few cases proceeded to the litigation stage.

42 VA. CODE ANN. § 59.1-525 (Supp. 2005).

43 Walter E. Williams, *Price Gouging*, TOWNHALL.COM, Mar. 24, 2004, <http://townhall.com/columnists/walterwilliams/ww20040324.shtml>.

44 FLA. STAT. ANN. § 501.160 (West 2002 & Supp. 2005).

45 David J. Federbush, *Business Law: The Unclear Scope of Unconscionability in FDUTPA*, FLA. B.J., July/August 2000, at 49, 51 n.24.

46 *Codified at* ARK. CODE ANN. §§ 4-88-301 to -305 (2001 & Supp. 2005).

47 Gina Cothorn, Melissa C. Krebs, & Robin Neil Rhodes, *Survey of Legislation: Business Law*, 20 U. ARK. LITTLE ROCK L. REV. 377, 384 n.112 (1998).

48 *Id.* at 384.

49 CAL. BUS. & PROF. CODE § 7123.5 (West 1995); CAL. CIV. CODE §§ 1689.5-1689.7, 1689.10-1689.12, 1689.14 (West 1985 & Supp. 2005); CAL. PENAL CODE § 396 (West 1999 &

following the 1994 Northridge earthquake;⁵⁰ Georgia adopted its law⁵¹ after its Governor's Office of Consumer Affairs received fifty-seven complaints of gouging following tornadoes and flooding in 1994.⁵²

This section outlines the various models of state disaster-specific anti-gouging laws. I will not consider every provision of every law; rather, I simply attempt to describe the various alternative anti-gouging laws that states have pursued.

There are three primary models of anti-gouging law. The first is a "percentage increase cap" model, in which post-disaster price increases are limited to a specific percentage over pre-disaster prices. The second category of laws bars "unconscionable" price increases with varying definitions of unconscionability. The third category of laws bars any increase at all.

1. *Percentage price caps.*—One form of anti-gouging statute bars price hikes in the wake of a declaration of an emergency that exceed a certain percentage point increase over the pre-emergency price level. The Arkansas and California statutes are the primary representatives of this category of anti-gouging law. Arkansas' statute appears to have been modeled on California's law.⁵³

Both laws prohibit merchants, upon proclamation of a state of emergency, from selling consumer food items, goods, or services for a price more than ten percent above the price charged prior to the proclamation of the emergency.⁵⁴ The prohibitions apply for thirty days after the declaration of a state of emergency,⁵⁵ but exceptions will be granted for merchants who can show specific increases in their own costs.⁵⁶ Emergencies include natural or man-made disasters, such as floods, fires, earthquakes, and riots.⁵⁷ The covered products and services include building materials, emergency and medical supplies, and human/animal food and drink.⁵⁸ The laws prohibit contractors from charging more than ten percent of their pre-declaration prices for repair or reconstruction services for 180 days following the dec-

Supp. 2006).

50 Sean P. Lafferty, *Consumer Protection; Emergencies—Protection Against Price Gouging*, 26 PAC. L.J. 215, 217 (1995).

51 GA. CODE ANN. §§ 10-1-393.4 to -397 (2000 & Supp. 2005).

52 John A. Creasy, Jr., *Selling and Other Trade Practices*, 12 GA. ST. U. L. REV. 31, 32 (1995).

53 Compare ARK. CODE ANN. § 4-88-303 (2001 & Supp. 2005) with CAL. PENAL CODE § 396 (West 1999 & Supp. 2006).

54 § 4-88-303(a)(1); § 396(b).

55 *Id.*

56 § 4-88-303(a)(2), (b)(2); § 396(b)-(c).

57 § 4-88-303(b)(1); § 396(h)(1).

58 § 4-88-303(a)(1); § 396(b), (h).

laration of a state of emergency.⁵⁹ They also make violations punishable as misdemeanors.⁶⁰

California's law has been criticized on the grounds that it may be impractical, difficult to enforce, and applicable only to retail providers rather than wholesale suppliers.⁶¹ In addition, both laws present apparent loopholes to the extent that businesses are able to raise their prices *after* a disaster or terrorist attack but *before* the formal "proclamation" of an emergency. Since the law only applies to post-proclamation price hikes, businesses can avoid liability by hiking prices prior to an impending disaster (if there is sufficient warning) or immediately after a disaster, so long as they beat the proclamation. This creates both opportunities for evading the law and perverse incentives for suppliers. Suppliers who fear being locked into pre-proclamation prices may raise prices prematurely, before market conditions justify it, and thus lose business.

2. *Unconscionability Laws.*—*i. Structure of Laws.*—Several states, including Massachusetts, Virginia, Florida, Indiana, and South Carolina, attack gouging by barring the sale of goods at "unconscionably high prices"⁶² or "grossly excessive prices"⁶³ after emergencies. The degree to which such laws define unconscionability, or specify limits to the range of products covered, varies.

Some of the laws apply only to specific products. Massachusetts' and Indiana's laws focus solely on petroleum, making gasoline price gouging "during any market emergency"⁶⁴ an unfair or deceptive act and barring "charging an unconscionable amount for the sale of fuel."⁶⁵ The laws of

59 § 4-88-303(b)(1); § 396(c).

60 § 4-88-304(b); § 396(f).

61 See Lafferty, *supra* note 50, at 217-18.

62 940 MASS. CODE REGS. 3.18 (2005).

63 N.Y. GEN. BUS. LAW § 396-r(1) (McKinney 1996 & Supp. 2005). The statute further defines the relevant adverse market conditions triggering the act as "weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor." § 369-r(2).

64 940 MASS. CODE REGS. 3.18.

65 IND. CODE ANN. § 4-6-9.1-2 (West 2005).

New York,⁶⁶ Virginia,⁶⁷ and Florida,⁶⁸ however, apply to “essential consumer goods.”

In addition, there are various definitions of unconscionability. A number of state laws (including Massachusetts, Indiana, and New York) focus on whether there is a “gross disparity” between the offered price and the price charged by the seller “immediately prior to the onset of the market emergency.”⁶⁹ Some laws may also, or instead, compare the post-disaster price to the *average* price at which the product was “readily obtainable” prior to the disaster.⁷⁰ Some also bar prices grossly above those at which the “product is readily obtainable by other buyers in the trade area.”⁷¹ New York law defines an “unconscionably excessive price” as one at which the “excess in price is unconscionably extreme” or one at which “there was an exercise of unfair leverage or unconscionable means.”⁷² Alabama’s hybrid statute defines the illegal unconscionable price in terms of percentage increases. Under that law, *prima facie* evidence of unconscionability is charging “an amount equal to or in excess of twenty-five percent of the average price . . . prior to the declared state of emergency.”⁷³

Most of these laws allow sellers to charge higher prices in the event that they experience higher costs due to the emergency or market disruption.⁷⁴ However, statutory language differs in some potentially legally significant ways. Virginia’s law allows price increases incurred “*solely*” as a result of “additional costs.”⁷⁵ New York’s law allows higher costs un-

66 New York law applies to all “essential consumer goods,” meaning those used or bought “primarily for personal, family or household purposes.” § 396-r(2).

67 Virginia law applies to any “necessary goods and services,” meaning any good for which consumer demand does, or is likely to, increase as a consequence of the disaster, and includes, but is not limited to, water, ice, consumer food items or supplies, property or services for emergency cleanup, emergency supplies, communication supplies and services, medical supplies and services, home heating fuel, building materials and services, tree removal supplies and services, freight, storage services, housing, lodging, transportation, and motor fuels.

VA. CODE ANN. § 59.1–526 (Supp. 2005).

68 Florida’s law applies to “any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a direct result of the emergency.” FLA. STAT. ANN. § 501.160(2) (West 2002 & Supp. 2005).

69 940 MASS. CODE REGS. 3.18 (2005); *see also* FLA. STAT. ANN. § 501.160(1)(b)(2); IND. CODE ANN. § 4–6–9.1–2; N.Y. GEN. BUS. LAW § 396-r(3)(b)(i), (ii); S.C. CODE ANN. § 39–5–145 (2005); VA. CODE ANN. § 59.1–527.

70 *See, e.g.*, FLA. STAT. ANN. § 501.160(1)(b)(2); IND. CODE ANN. § 4–6–9.1–2; S.C. CODE ANN. § 39–5–145; VA. CODE ANN. § 59.1–527.

71 940 MASS. CODE REGS. 3.18.

72 N.Y. GEN. BUS. LAW § 396-r(3)(a).

73 ALA. CODE § 8–31–4 (LexisNexis 2005).

74 940 MASS. CODE REGS. 3.18; FLA. STAT. ANN. § 501.160(1)(b)(2) (West 2005).

75 VA. CODE ANN. § 59.1–527 (West 2005) (emphasis added). The use of the term “solely”

der the condition that additional costs are “imposed on the defendant for the goods or services” through circumstances “not within the control of the defendant.”⁷⁶ Increases attributable to cost factors, such as “replacement costs, taxes, and transportation costs incurred by the retailer” are not subject to sanction.⁷⁷

The laws also vary in their geographic scope. Most laws do not specify the area to which they apply. Some laws are more limited. Virginia and South Carolina laws apply only “within the area for which the state of emergency is declared.”⁷⁸ The statutes also vary in terms of the duration of application. Virginia law, for example, applies for thirty days following the “time of disaster.”⁷⁹

Violations of these statutes can lead to civil fines and penalties,⁸⁰ jail time,⁸¹ restitution,⁸² and revocation of relevant licenses.⁸³ Some statutes explicitly disavow the creation of a private right of action.⁸⁴

ii. *Litigation.*—New York’s anti-gouging law has led to some of the few reported opinions related to anti-gouging statutes. In *People v. Two Wheel Corp.*, the state sought an injunction to stop price gouging related to the sale of electric generators during Hurricane Gloria.⁸⁵ The defendants were charged with violating the anti-gouging laws between September 26 and October 8, 1985, after the hurricane led to power outages on Long Island. They had raised prices on generators by as much as sixty-seven percent.⁸⁶

The defendants appealed the lower court’s injunction, first by arguing that electric generators were not covered by the statute’s definition of “essential consumer goods.” The court rejected this argument on the ground

in the heightened cost clause reduces the likelihood of evidentiary debates about the sources of price increases.

76 N.Y. GEN. BUS. LAW § 396-1(3) (McKinney 2005) (emphasis added).

77 IND. CODE ANN. § 4-6-9.1-2 (West 2005).

78 VA. CODE ANN. § 59.1-527; S.C. CODE ANN. § 39-5-145 (2005).

79 “Time of disaster” is defined as the shorter of the period when a declaration is in effect, or thirty days after a disaster. VA. CODE ANN. § 59.1-526.

80 See ALA. CODE § 8-3-1-5 (2005) (fines of up to \$1000 per violation and a total of \$25,000 for any 24-hour period); FLA. STAT. ANN. § 501.160(2) (West 2005); S.C. CODE ANN. § 39-5-145 (2005).

81 See S.C. CODE ANN. § 39-5-145 (imprisonment up to 30 days for willful violations).

82 See, e.g., FLA. STAT. ANN. § 501.160(2)-(3) (West 2005) (stating a violation of § 501.160 is also a violation of § 501.204, which is punishable by restitution under § 501.2075).

83 See ALA. CODE § 8-3-1-5.

84 See ALA. CODE § 8-3-1-6; FLA. STAT. ANN. § 501.160(7). The New York law does not currently include a private right of action. See *Americana Petroleum Corp. v. Northville Indus. Corp.*, 606 N.Y.S.2d 906 (N.Y. App. Div. 1994). Proposed legislation would create a private right of action. Assemb. 662, 228th Ann. Legis. Sess. (N.Y. 2005).

85 *People v. Two Wheel Corp.*, 512 N.Y.S.2d 439, 440 (N.Y. App. Div. 1987), *aff’d*, *People v. Two Wheel Corp.*, 525 N.E.2d 692 (N.Y. 1988).

86 *Id.* at 440-41.

that the generators were marketed and bought for household use.⁸⁷ Second, the defendants argued that they had raised triable issues of fact concerning whether the higher prices they were charging were due to “increased freight and labor expenses incurred by them during the power failure.”⁸⁸ The court rejected this argument, finding that the defendants’ evidence on this point consisted solely of declarations that such costs had increased rather than actual evidence that they had.⁸⁹ In a far more questionable holding, the court found that labor and shipping costs were not “the type of costs expressly taken into account by the language of the statute.”⁹⁰ The court did not explain its reasoning. Perhaps shipping and labor costs are not considered costs “for the goods,” although that assertion is questionable given that labor and shipping costs are elements of the cost of a good or service. Nor is it fair to say that labor and shipping costs are not “imposed” on a seller or are within a seller’s control, because the seller can simply refuse to pay higher prices and decline to purchase the shipping/labor services. Such a construction would erase the added costs exception since any cost the seller agrees to pay (including for raw material or product) is ultimately “within” the seller’s control. Third, the court rejected the defendants’ assertion that the price increases were not unconscionable.⁹¹

Finally, the court rejected the defendants’ argument that the statute was unconstitutionally vague.⁹² The mere fact that the statute did not contain a “fixed rate or percentage of permissible price increase” did not make it unconstitutional.⁹³ Affirming the New York Supreme Court, Appellate Division’s holding, the New York Court of Appeals cautioned that not “all price increases are prohibited during periods of abnormal market disruptions,”⁹⁴ but ruled that in the instant case the attorney general had met his burden of proving an unconscionable price increase.⁹⁵

In *People v. Chazy Hardware, Inc.*, the attorney general challenged a price increase in electrical generators following a January, 1998 ice storm which left thousands of homes and businesses without electrical power.⁹⁶ The defendant had sold generators purchased at \$533–\$656 for up to \$1,190 during the immediate aftermath of the storm.⁹⁷ Again, the court upheld

87 *Id.* at 440.

88 *Id.* at 440–41.

89 *See* *People v. Two Wheel Corp.*, 512 N.Y.S.2d at 441.

90 *Id.*

91 *See id.*

92 *See id.*

93 *Id.*

94 *People v. Two Wheel Corp.*, 525 N.E.2d 692, 700 (N.Y. 1988), *aff’g* *People v. Two Wheel Corp.*, 512 N.Y.S.2d 439 (N.Y. App. Div. 1987).

95 *See id.* at 699–700.

96 *People v. Chazy Hardware, Inc.*, 675 N.Y.S.2d 770, 771 (N.Y. Sup. Ct. 1998).

97 *Id.* at 771–72.

the statute against a challenge of unconstitutional vagueness.⁹⁸ The court further found that the price charged was unconscionable as a matter of law because it amounted to price hikes of between fifty-nine percent and ninety-three percent.⁹⁹

That same ice storm also produced perhaps the most curious case on the New York price-gouging law, *People v. Beach Boys Equipment Co.*¹⁰⁰ Beach Boys sold generators at \$1,200, twice the price charged by other retailers.¹⁰¹ Yet the defendant had *paid* \$1,000 to purchase the generators from its supplier.¹⁰² The court found that respondent failed to show that the price was “imposed” upon it because it “did not explain why it paid its supplier \$1,000 for a ... generator that retails for \$550, nor did it respond to proof that the supplier purchased the generators for \$480.”¹⁰³ Although the government apparently produced evidence that the purchase “was not an arm’s length transaction”¹⁰⁴ (although we are never told why), it would seem obvious that the respondent paid a higher price because it knew it could get a higher price due to increased demand for the generators. Although the appellate court modified the lower court’s restitution order, it upheld a finding of a violation of the anti-gouging law.¹⁰⁵

3. *No-increase laws.* — The harshest type of anti-gouging law bars any price increase beyond that required by the higher costs of post-disaster economic activity. Georgia, Louisiana, Mississippi, and Connecticut have such laws. Three of these laws played or are likely to play a role in the aftermath of Hurricane Katrina. Georgia’s governor invoked its law to declare a state of emergency after Katrina prompted gas price levels to rise as high as \$6.00 per gallon.¹⁰⁶ Mississippi and Louisiana, of course, bore the brunt of Katrina’s physical impact.

These no-increase laws differ in terms of the products to which they apply and their necessary triggering events. Georgia law applies only to essential consumer goods, barring selling “at retail any goods or services necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency.”¹⁰⁷ Louisiana’s law is broader:

98 *See id.* at 773–74.

99 *Id.* at 773.

100 *People v. Beach Boys Equip. Co.*, 709 N.Y.S.2d 729 (N.Y. App. Div. 2000).

101 *Id.* at 730.

102 *Id.*

103 *Id.* at 730–31.

104 *Id.* at 731.

105 *Id.*

106 *Perdue Works to Stem Price Gouging* (WXIA television broadcast Sept. 2, 2005).

107 GA. CODE ANN. § 10-1-393.4(a) (1995).

During a state of emergency as declared by the governor or as declared by the parish president, the value received for goods and services sold within the designated emergency area may not exceed the prices ordinarily charged for comparable goods and services in the same market area at, or immediately before, the time of the state of emergency.¹⁰⁸

Perhaps fortuitously (time will tell), Louisiana law was amended on June 28, 2005, just two months before Katrina struck, to broaden the trigger to include both declared states of emergency *and* “during a named tropical storm or hurricane in or threatening the Gulf of Mexico.”¹⁰⁹ Mississippi also bars pricing above “the prices ordinarily charged” for “*all goods and services sold within the designated emergency area*” following the declaration of a state of emergency or local emergency.¹¹⁰ Legislation in 2005 broadened the area in which the law applied from the “designated” area of emergency to the entire state.¹¹¹

Connecticut law allows the government to declare two types of emergencies that trigger price controls: an energy emergency or a supply emergency.¹¹² The law bars selling energy resources at a price “which exceeds the price at which such energy resource was sold ... prior” to the Governor’s declaration of an “energy emergency.”¹¹³ The governor can also designate a particular product as being “in short supply or in danger of becoming in short supply,” which imposes the same cap on the prices of the designated product.¹¹⁴ Georgia, Mississippi, and Louisiana law allow for increases caused by higher costs.¹¹⁵

Punishment under these laws includes fines, civil liability, and criminal liability. Violations of the Georgia Act can lead to civil fines: \$2,000 for a willful violation, \$5,000 with cause, and \$10,000 if the gouging is related to

108 LA. REV. STAT. ANN. § 29:732 (2005).

109 2005 La. Sess. Law Serv. 149 (West).

110 MISS. CODE ANN. § 75–24–25 (2003) (pending legislation in 2006 MS H.B. 86 (NS)) (emphasis added).

111 H.B. 1309, 120th Legis. Sess., Reg. Sess. (Miss. 2005) (enacted).

112 CONN. GEN. STAT. § 42–232 (1991).

113 CONN. GEN. STAT. § 42–232(b).

114 CONN. GEN. STAT. § 42–232(a).

115 Georgia law permits sellers to raise prices in response to an increase in the cost of acquiring or transporting goods to the disaster area. GA. CODE ANN. § 10–1–393.4(a) (1995).

Louisiana law allows sellers to “include reasonable expenses and a charge for any attendant business risk, in addition to the cost of the goods and services which necessarily are incurred in procuring the goods and services during the state of emergency.” LA. REV. STAT. ANN. § 29:732 (2005). Mississippi law allows increases for “any expenses, the cost of the goods and services which are necessarily incurred in procuring such goods and services during a state of emergency or local emergency.” MISS. CODE ANN. § 75–24–25 (2003) (pending legislation in 2006 MS H.B. 86 (NS)) (emphasis added).

the sale of supplies used for salvage, repair, or reconstruction.¹¹⁶ Louisiana law provides for civil remedies, including restitution.¹¹⁷ Violations of the Connecticut law are unfair trade practices and can lead to civil fines and up to one year in prison.¹¹⁸ Mississippi's law imposes what are probably the harshest punishments for price gouging. If the defendant's conduct is "willful" and the price differential between post- and pre-disaster price is more than \$250, the violation is a felony punishable by a fine and not less than one year and up to five years in prison.¹¹⁹ Violations amounting to a smaller price differential are misdemeanors.¹²⁰ Legislation in Mississippi in 2005 lowered the price differential triggering felony punishment from \$250 to \$50.¹²¹

II. THE LAW AND ECONOMICS OF PRICE CAPS AND ANTI-GOUGING LAWS: THE TRADITIONAL VIEW

Anti-gouging laws and other price mechanisms may be "well-meaning interventions... designed to manipulate market allocations," but according to the standard economic view they often "backfire because they cannot account for the complex incentives in an intricate industry."¹²² One of the "fundamental prediction[s] of economics is that price controls reduce the supply of the good or service whose price is controlled."¹²³ Price controls are thus "counterproductive," leading to "deadweight loss."¹²⁴ Law and economics does not distinguish between "naked" price controls (in which a government agency sets the actual price at which producers can sell) and the anti-gouging laws described in the previous section.¹²⁵ Such laws limit prices based on some aspect of their pre-disaster level; since the forces of supply and demand would inevitably lead to inflationary pressure for most "necessaries" following a disaster, anti-gouging laws will have the same economic effect as a traditional price cap.¹²⁶

116 GA. CODE ANN. §§ 10-1-397(a)(1)(B), 10-1-397(a)(2)(B) (1975), 10-1-438 (1995).

117 LA. REV. STAT. ANN. § 29:732.

118 CONN. GEN. STAT. § 42-232(d) (1991).

119 MISS. CODE ANN. § 75-24-25.

120 *Id.*

121 H.B. 1309, 120th Legis. Sess., Reg. Sess. (Miss. 2005) (enacted).

122 Deck & Wilson, *supra* note 8, at 28.

123 Patricia M. Danzon & Scott E. Harrington, *Workers' Compensation Rate Regulation: How Price Controls Increase Costs*, 44 J.L. & ECON. 1, 1 (2001).

124 *Id.*

125 See Editorial, *In Praise of 'Gouging'*, WALL ST. J., Sept. 7, 2005, at A16 (referring to anti-gouging statutes as "de facto price controls" and arguing that they are "wrongheaded").

126 A distinction could be made between price controls and anti-gouging laws in that anti-gouging laws generally apply only in the short- and medium-term. Over that time horizon,

Even after a hurricane, terrorist strike, or other disaster, the standard law and economics thinking would be that price caps and anti-gouging laws reduce economic efficiency by misallocating resources.¹²⁷ Caps and limits on price increases induce shortages if they are operative at a price below the market equilibrium.¹²⁸ John Lott, an American Enterprise Institute fellow and frequent author in the area of law and economics, wrote after Hurricane Katrina that “political threats of price controls and price-gouging lawsuits” would, in the long run, mean that “consumers... will suffer.”¹²⁹ Price controls do not stop prices from rising, says Lott, they only “change[] how [consumers] pa[y].”¹³⁰ Time spent in lines at gas pumps, for example, replaces money paid for gas after price controls take effect.¹³¹ The fact that these costs are not reflected in the sticker price of a product does not render them illusory.¹³² These efforts to obtain products in the face of shortages amount to a waste of time and resources that could otherwise be used to clean up the mess caused by a disaster and begin the rebuilding process.¹³³ Additionally, price controls have the effect of producing an inefficient allocation of goods—instead of the parties who value the goods most (and are willing to pay the highest prices) receiving the products and putting them to that high-value end use, someone else ends up with goods.¹³⁴

Moreover, anti-gouging laws or price caps may interfere with the natural corrective mechanisms of the market. High prices mean that inventories will build up as some consumers forego purchasing the affected prod-

supply may be inelastic. Price controls in the face of inelastic supply simply transfer wealth from suppliers to consumers, but lead to no deadweight loss. Most commentators would argue that supply of most products affected by anti-gouging laws will increase even in the short run, since suppliers will make every effort to bring products into affected areas in pursuit of higher profit margins and increased demand. See Lott & Jones, *supra* note 4.

127 See Martha Musgrove, Editorial, *Free Market? It's Price-Gouging—And It Stinks!*, MIAMI HERALD, Sept. 1, 1992, at 39A.

128 Price controls or caps generally have no effect on prices, or efficiency, if they are set at a level *above* what the market would produce free of restraint. An above-market price cap's only potential effect is to facilitate coordinated price fixing by affected firms, who can now use the price cap as a target price.

129 Lott & Jones, *supra* note 4, at A33.

130 *Id.*

131 *Id.*

132 See Donald J. Boudreaux, *On Price Gouging*, THE FREEMAN, April 2005, at 14.

133 *Id.*

134 See Moody, *supra* note 16 (“The higher price also served to ration a scarce good... to those consumers who wanted it the most...”). Moreover, if prices are capped either directly or indirectly through anti-gouging laws, consumers may face artificially low prices. Since their demand (and willingness to pay) is high in the aftermath of a disaster, early arrivals in the shop queue may purchase more of a product than they would otherwise be tempted to. Later arrivals could be left without access to any product at all. See Karen Selick, *There's Some Good in Gouging*, THE GLOBE AND MAIL, Jan. 1998, available at <http://www.karenselick.com/GM980124.html>.

ucts; with time, those accumulated inventories will lead to lower prices.¹³⁵ Price controls retard the accumulation of inventories of highly demanded products.

Economic analysis of “gouging” predicts that the market will punish suppliers who overcharge, meaning that they charge more than the market will bear, through the forces of competition. After a disaster, both supply and demand may push prices higher.¹³⁶ Supply contracts as existing stocks of products as well as substitutes are destroyed or contaminated.¹³⁷ At the same time, demand for “necessary” products like bottled water, food, and medicine may rise as consumers either develop new or additional need for the products,¹³⁸ or fear future shortages and desire to “hoard” against that possibility.¹³⁹ Prices naturally rise—but a seller who charges above the new adjusted market price will lose business to other rivals and be forced to lower prices back towards the market equilibrium. Laws to combat gouging are, in this view, unnecessary, because the market will punish overcharging on its own.

Law and economics may also object to additional incentives plausibly created by anti-gouging laws and their enforcement. For example, the uncertainty associated with triggering prices of various “unconscionability”-style laws may lead some sellers to simply shut down operations during emergency periods to avoid potential liability.¹⁴⁰ Anti-gouging laws’ potential to lead sellers to forego transactions entirely—like rent control’s potential to reduce new construction—is an economically inefficient outcome.

Price controls may also lead to black markets. As shortages develop in the mainstream market, opportunities for black marketers emerge. Black market sellers would demand even higher prices than the market (free of

135 Lott & Jones, *supra* note 4, at A33; *see also* In Praise of Price Gouging, <http://www.janegalt.net/blog/archives/005435.html> (Sept. 1, 2005) (“[H]igh prices don’t just make people want to drive less; they make people want to supply more. ... Prices of everything rise after a disaster, and a good thing too, since that encourages people and material to flood into the damaged area, where they’re needed most. When well-meaning politicians impose ‘anti-gouging’ laws, they slow the flow of resources to repair the damage.”)

136 *See* Boudreaux, *supra* note 131.

137 Gregory R. Kirsch, Note, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1256 (1993) (“[T]he supply infrastructure was devastated: there was no electricity or water, stores and warehouses were damaged, and roads were blocked.”).

138 *Id.* at 1256 (“Consumers will demand larger quantities of certain ‘emergency goods’ including food, flashlights, batteries, ice, ... generators, plywood, roofing materials, bottled water, hotel rooms and temporary apartments ...”).

139 *See* Boudreaux, *supra* note 132.

140 *See* Bell, *supra* note 14 (explaining that a seller wishes she had simply closed her stations on September 11, which the attorney general said would have prevented legal action against her).

restraint) in order to compensate for increased risk levels.¹⁴¹ Black markets lead to untaxed transactions and increase the criminal element in post-disaster markets.

III. AN ALTERNATIVE ECONOMIC FRAMEWORK

In spite of the dark picture painted of anti-gouging laws by traditional exponents of law and economics, this Article argues that there are hidden economic efficiency gains associated with such laws. Therefore, anti-gouging laws need not be defended solely on fairness grounds,¹⁴² but rather can be justified using the same concepts and vocabulary used by law and economics advocates that attempt to bring them down.

This section explores two economic rationales for anti-gouging laws. First, the Article explores the effects of natural and man-made disasters on modern payment systems. Second, the Article explores the role of behavioral economics and pricing mechanism inefficiencies in post-disaster consumer markets.

A. Massive Payment System Collapse

The beginning of the economic case for anti-gouging laws is the transformation of the American consumer economy in this era of electronic payment processing.¹⁴³ The last fifteen years have seen a revolution in the manner in which consumers and businesses pay for goods and services. There is far greater use of electronic payment methods than ever before.¹⁴⁴ Check usage is declining by double-digit percentages each year—from fifty billion checks written in 1995 to 37 billion in 2004.¹⁴⁵ At the same time, the number of electronic payments (including debit cards, credit cards, and automated clearinghouse systems) has increased from about thirty billion transactions in 2001 to forty-four billion transactions in 2003.¹⁴⁶ As a society, our dependence on these payment mechanisms has become clear.

These new electronic payment processing systems, however, are extremely vulnerable to short-term disruptions caused by disasters and terrorist strikes. Hurricanes, earthquakes, tornadoes, and large-scale terrorist

141 Kirsch, *supra* note 137, at 1259.

142 See Jolls, Sunstein & Thaler, *supra* note 23, at 1513.

143 See Julia Alpert Gladstone, *Exploring the Role of Digital Currency in the Retail Payments System*, 31 NEW ENG. L. REV. 1193 (1997).

144 See *Federal Reserve Banks Announce Changes to Increase Efficiency in Check Services*, BANKING & FIN. SERV. POLICY REPORT, Nov. 7, 2005, at 10.

145 *Id.*

146 *Id.*

attacks have massive physical consequences.¹⁴⁷ Among these consequences are water damage to computer and telecommunications infrastructure and power outages.¹⁴⁸ Large-scale disasters and attacks, in the short run, may have the effect of disabling vulnerable modern payment systems.¹⁴⁹ Systems may be destroyed and individual records needed to access electronic resources may be lost.¹⁵⁰ "Old fashioned" payment mechanisms (cash and checks) are also not immune. Rain and flooding destroy the ink and paper on checks and may wash away cash and credit cards.¹⁵¹ Because of increasing dependence on electronic payment systems, consumers may no longer keep on hand as many checks or as much cash as they did in the past, magnifying the effects on liquidity of a disaster or terrorist attack. Stories of consumers losing access to their economic assets during Hurricane Katrina's aftermath abound.¹⁵²

Disasters and terrorist attacks could have potentially disabling effects on modern payment mechanisms. In that context, anti-gouging laws may make economic sense. The standard law and economics theory objected to anti-gouging rules in large part because of their effects on allocative efficiency and their interference with the operation of market supply and demand. However, the effects of a payment system collapse from a post-disaster market failure may prevent those forces from actually operating as law and economics foretells. Consumers may place immense value on a particular product, but with limited access to hard currency and to their

147 Copelan & Lamb, *supra* note 22, at 30 ("Andrew was the third most intense hurricane to hit the United States in the twentieth century. Roofless houses, treeless neighborhoods, downed street lights and signs, and massive damage to other building structures covered much of southern Dade County. ... [T]here were as many as 250,000 people homeless, 85,000 people jobless, and an estimated 85,000 uninhabitable structures.").

148 See Thomas A. Birkland, *Disasters and the Courts' Agenda*, 37 No. 4 JUDGES' J. 6, 8 (1998) ("Even relatively small disasters can damage electrical and mechanical systems, rendering buildings unusable.").

149 Albert B. Crenshaw, *Rebuilding, Without Financial Records*, WASH. POST, Sept. 2, 2005, at D1 ("How do you get a credit card bill, let alone pay it, when your house is gone, your very address is gone, your bank's offices are gone?"); see also Birkland, *supra* note 147, at 7 ("As modern society becomes more dependent on electricity, phones, computers, and other convenience, natural disasters can cut us off from these conveniences that we take for granted, severely disrupting our lives and making the disaster recovery process even more difficult.").

150 See Crenshaw, *supra* note 149 ("As tens of thousands of families and businesses struggle to rebuild after Hurricane Katrina, many of them will find themselves not only without homes, cars and other possessions but also without the paper and perhaps even electronic records and resources fundamental to the working of American life and commerce.").

151 See, e.g., *Economic Snapshot*, THE NEWARK STAR-LEDGER, Sept. 7, 2005, at 6. ("Social Security cards, driver's licenses, credit cards and other personal documents are literally floating around New Orleans ...").

152 See Kevin G. Hall, *Callers Seek ATMs, Rescue; Bank Hotline Takes Calls Asking for Help with Finances, Mail*, CHARLOTTE OBSERVER, Sept. 5, 2005, at 10A ("One man asks why don't [sic] ATM cards work. A woman lost her credit cards, checkbook and all forms of identification in Hurricane Katrina.").

electronic assets, consumers may simply be unable to purchase the products at an elevated price. Products won't go to those who value them most, but rather to those whose money-under-the-mattress happens to have survived explosion, fire, or flood. While a true neoclassical economist might expect alternative payment methods (such as ad hoc promissory notes and guarantees) to develop for overcoming such limitations, that expectation is probably unrealistic in the immediate confusion and clutter of a terrorist attack or natural disaster.

Moreover, consumers may be operating under imperfect information (or irrationality) in post-disaster settings. Consumers may not know exactly what they will need to survive the aftermath of a disaster at the time they confront a particular purchase. They may make poor initial decisions, which their lack of access to electronic assets may make difficult to overcome.

When consumers are unable to access their economic resources because of electronic payment system collapse, they may have to simply do without certain products. The effects of foregone consumption in a post-disaster environment are magnified by potential negative externalities. For instance, consumers who forego toiletries and disinfectants may develop bacterial infections or diseases that they spread to other survivors. Consumers who forego gasoline and the vehicular mobility it facilitates may remain in crowded, unstable environments, leading to violent tinderboxes or the need for dangerous and expensive government rescue efforts.

Anti-gouging laws may help mitigate these tragic results in the short-term. By creating disincentives for prompt price inflation, anti-gouging laws may give consumers time to make intelligent choices and to obtain products with their limited hard currency assets before those currency reserves run out. With time, consumers will be able to access their electronic resources. But in the short-term, consumers may have greater demand for products with positive externalities than their limited resources permit them to satisfy.

This analysis provides an economic case for anti-gouging laws. However, it also suggests proper limits for those laws. First, anti-gouging laws should be limited to the areas of the actual physical effect of a disaster or attack, or to areas where survivors of such attacks or disasters are likely to flee. Laws with geographic limits—such as Virginia's¹⁵³ and South Carolina's¹⁵⁴—are most likely to have the efficiency advantages described in this section. On the other hand, proposals that apply to anti-gouging laws on a statewide level (like the one enacted in Mississippi earlier this year),¹⁵⁵ even when the disaster only impacts a limited area in a physical sense, are not economically wise. Similarly, applying anti-gouging laws in areas far

153 See *supra* Section I.C.2.

154 See *supra* Section I.C.2.

155 See *supra* Section I.C.3.

from disaster zones—like Georgia's invocation of its law after Hurricane Katrina¹⁵⁶ or Michigan's effort to punish gas price gougers after the September 11 attacks¹⁵⁷—does not make economic sense. Once we recognize the importance of payment mechanism breakdowns as a justification for anti-gouging laws, it becomes clear that disaster and relief policymakers with the authority to establish boundaries for disaster zones should limit such boundaries to the areas in which there are physical effects, or numerous refugees whose access to the tools of electronic payment methods may have been compromised.¹⁵⁸ In concrete terms, the logic developed in this Article speaks in favor of applying anti-gouging laws in Mississippi and Louisiana after Hurricane Katrina, but against applying them anywhere except lower Manhattan following the September 11 attacks.

Second, anti-gouging laws should only apply in circumstances where there is actual and widespread physical destruction. Where the destructive effects of an attack are limited, or have only psychological consequences, anti-gouging laws are not appropriate because there are not likely to be breakdowns in electronic payment systems. While consumers may panic and attempt to hoard goods, thereby leading to a price jump, the best policy is to let the market check such irrational behavior. Only where an emergency leads to real destruction on a wide level should anti-gouging laws apply. To the extent that current laws are triggered only by gubernatorial decree, governors should only declare emergencies when and in those areas where there has been physical destruction. Again, this logic suggests that anti-gouging laws were not economically efficient when applied after the September 11 attacks outside of the immediately affected areas in lower Manhattan. However, such laws likely will enhance efficiency to the extent they are applied in mid-to-coastal Louisiana and Mississippi in the aftermath of Hurricane Katrina.

Third, anti-gouging laws should (as most do) come with strict time limits. Electronic payment systems are quite vulnerable in the short-term, but with time can be repaired. Consumers should be able to access their bank account information—particularly from national banks—within a short amount of time after removing themselves from a disaster area. Although Katrina certainly demonstrated that response is not always prompt, govern-

¹⁵⁶ See *supra* Section I.C.3.

¹⁵⁷ See *supra* notes 15–17 & accompanying text.

¹⁵⁸ Hurricane Katrina demonstrated that refugees will often flee far beyond the immediately affected area. Law professors and students from New Orleans schools surfaced here in Toledo, as well as in Chicago and in a number of East Coast cities. In most cases, I suspect that refugees who traveled such distances did so to be close to family members who lived in such cities. Because such family members likely provided short-term financial support to the extent that refugees were unable to access their own assets, those refugees are less of a concern than those who remain in more proximate environments.

ment programs can also step in to provide affected victims with enough cash to be able to satisfy their immediate needs.

Fourth, such laws should not apply to all products (most do not), but only to those products likely to be in high demand after the particular disaster. Moreover, enforcement agencies should target prosecution towards sellers of products most likely to help alleviate negative externalities. Medicine, communications equipment, and transportation services, more so than even food, are likely to have such external effects.

B. Behavioral Economics and Product Market Inefficiency

A second economic justification for anti-gouging laws begins with recognition of the limits of pricing market efficiency in the face of natural or man-made disasters. The law and economics critique of anti-gouging laws presumes that markets operate with minimum friction or inefficiency. Prices may rise in the short run after a supply shock or insecurity-generated upswing in demand, but in time, as inventories build and supply expands, prices will fall. Interfering with the natural forces of the market may prevent this self-correcting mechanism from functioning properly.

The problem with this argument is that markets are not always perfect. In particular, to the extent that the pricing mechanism for a particular product suffers from asymmetric inefficiency, the law and economics story is not wholly satisfying.

Prices, in the real world, are sticky. Behavioralists have argued persuasively that consumers and suppliers do not always behave as rational risk-averse self-interested utility maximizers. Instead, real-world decision making is often affected by psychological “heuristics,” which are short-cuts that individuals internalize to reduce the psychic costs of decision-making.¹⁵⁹ Two of these heuristics—availability and anchoring—are particularly important in post-disaster markets.¹⁶⁰

The availability heuristic leads to seemingly irrational behavior because market actors overestimate the probability of an event if they have witnessed that event.¹⁶¹ In post-disaster markets, the availability heuristic may lead to higher price hikes than supply shocks and increased demand would require. Suppliers in affected areas—having witnessed the destructive force of a natural disaster or terrorist attack and experienced first hand the difficulty of conducting “business as usual”—may *overestimate* the market impact of the relevant event. Fearing widespread supply outages

159 See Jolls, Sunstein & Thaler, *supra* note 23, at 1477–78 (explaining heuristics that are utility maximizing over the long run do not always produce seemingly rational results with respect to individual decisions).

160 *Id.* at 1477–80; see also James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO ST. L.J. 1333, 1372 (2001).

161 Jolls, Sunstein & Thaler, *supra* note 23, at 1477.

and future difficulties, suppliers may increase prices beyond the market equilibrium.

The anchoring heuristic then comes into play. Anchoring describes the process by which an individual attaches a particular value to an item because the value is "available" or "strongly present in the mind."¹⁶² Even after new information becomes available, the "anchored" mind is reluctant to adjust its preferences accordingly.¹⁶³ In the post-disaster context, law and economics predicts that suppliers who overprice will be punished by the market and accumulate unsold inventories, such that they will quickly be forced to lower prices. Instead, anchoring suggests that individual suppliers may continue to charge inefficiently high prices *even after they become aware that they have overestimated the market impact of the disaster*.

As a result of the interplay of these two individual decisionmaking heuristics, markets for some products may overreact quickly to the news of a disaster. Markets may then be slower to correct than law and economics predicts. Prices will remain above the optimal level, and consumers who *should* be purchasing goods and services will not be. The impact of this inefficiency is again exacerbated by the negative externalities associated with forgoing consumption of products like medicine and fuel in a post-disaster environment. Sticky, supra-optimal pricing leads to wasted resources and inefficiencies.

Anti-gouging laws may therefore be defended as preventing overreaction in the face of news of a disaster. Because legal limits exist on price increases, producers may not raise prices to an irrationally high level. Even if anti-gouging laws lead to below-market pricing in the immediate aftermath of a natural or man-made disaster, as supply expands and demand retracts in the weeks after a disaster, that pricing level may be the more optimal level over a medium-run view than what a sticky market would have yielded. In other words, it is plausible that anti-gouging laws represent a trade-off between short-run inefficiencies and medium-run inefficiencies. By emphasizing only the short-run inefficiencies of anti-gouging laws, a standard law and economic analysis misses the total picture.

Empirical evidence has substantiated fact patterns consistent with this analysis. Petroleum products react sharply to supply shocks (i.e., decreases in supply), but then seem to respond at a lag to subsequent supply expansion. Numerous studies have documented that when oil prices rise, gasoline prices quickly follow (oil being a "supply" element of gasoline and other derivative petroleum products).¹⁶⁴ Yet, when oil prices fall, gasoline prices

162 See Fanto, *supra* note 160, at 1372.

163 See Alex Geisinger, *Nothing But Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 482 (1997).

164 Margherita Grasso & Matteo Manera, *Asymmetric Error Correction Models for the Oil-Gasoline Price Relationship*, FONDAZIONE ENI ENRICO MATTEI, May 2005, http://www.feem.it/Feem/Pub/Publications/WPapers/WP2005-075.htm?WP_Page=1.

fall far more slowly.¹⁶⁵ The petroleum market's corrective mechanisms are asymmetrical in their efficiency.

This analysis of pricing market inefficiency does not lead to precisely the same conclusions about the proper scope and application of anti-gouging laws as the previous subsection's payment-methods-failure analysis. Because pricing market inefficiency may extend beyond the actual borders of a disaster's physical impacts, anti-gouging laws may make economic sense under a pricing analysis even where the physical impacts of a disaster are not felt (but where news or word of mouth leads to an overestimation of the market impacts of a disaster). Still, the closer one is to ground zero, the more one is likely to over-weight the effects of a market impact. So while a pricing mechanism analysis might lead to justifications for broader application of anti-gouging laws, it also suggests that anti-gouging laws should be more vigorously enforced the closer one gets to the area of physical impact.

The pricing market theory also lends itself to greater empirical substantiation than the payment mechanisms analysis. Since the responsiveness of prices to natural disasters and their resulting stickiness in the face of "good news" is observable and can be empirically analyzed using event study analysis and time series, policymakers should be able to determine what types of products are particularly characterized by the dual impact of "availability" and "anchoring" as described in this section. It is with respect to those products, then, that anti-gouging laws may make the most sense.

IV. CONCLUSION

Three legal regimes exist to limit "price gouging" after natural and man-made disasters: (1) Antitrust law bars collaborative price increases; (2) Anti-gouging laws specifically target the difficult-to-define practice of gouging; and (3) General contract and consumer law may provide more common law remedies for aggrieved consumers. Neither antitrust law nor general contract law seems to play a major post-disaster role. Antitrust law generally only applies where there are cooperative arrangements to increase prices on the part of competitors. The law clearly bars such conduct and provides severe penalties. Therefore, collective action by competitors seems rare. Practical legal impediments to the use of contract and consumer law make them rather irrelevant as sources of post-disaster price relief. Therefore, this Article turned its attention to anti-gouging laws.

This Article argued that post-disaster anti-gouging laws may not be as bad as law and economics theory supposes. Such laws take many forms. Some bar any increase at all in the price of selected products after a disas-

ter; others impose (arbitrary) percentage caps on price increases; and other laws make unlawful "unconscionable" price increases.

A traditional law and economics analysis views such laws with the same disdain as naked price controls. Anti-gouging laws arguably lead to dead-weight loss, misallocation of resources, shortages, and do not bring down prices in the long term.

Yet, this Article highlights potential efficiency gains associated with carefully crafted anti-gouging laws. This is not to say that there are no legal or policy objections to such laws.¹⁶⁶ However, where disasters trigger payment system collapses and where consumption externalities are present, or where pricing mechanisms fail due to availability and anchoring, anti-gouging laws may help increase economic efficiency. Several states, however, have laws which are greater in scope than necessary to achieve these advantages, by including areas not physically affected by natural disasters and terrorist strikes among the areas subject to anti-gouging regulations. Such laws must either be reformed or justified on non-efficiency grounds.

¹⁶⁶ For a discussion of the Takings Clause implications of post-disaster price controls, see Kirsch, *supra* note 136, at 1261.